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No. 1235

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

< OCTOBER TERM, 1993 >

H. RICHARD AUSTIN and CORINNE AUSTIN,

Petitioners,

vs.

UNITED PARCEL SERVICE,

Respondent.

*****
ON PETITION FOR WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT
*****

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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20 pp

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

The sole issue presented by the Petitioners to the Supreme Court of the State of Vermont -- and the only issue decided by that Court -- was whether the state trial court abused its discretion under Vermont Rule of Civil Procedure 60(b)(3) in denying Petitioners' motion for relief from a jury verdict based upon an allegation of fraud.

Petitioners did not challenge, at trial or in the Vermont Supreme Court, the trial court's instructions to the jury on various issues of federal law -- the issues that Petitioners now discuss in their petition for a writ of certiorari.

Thus, the only issue that the Petitioners may present to this Court is the one that they previously presented to the Vermont Supreme Court -- whether the state trial court erred under Vermont Rule of Civil Procedure 60(b)(3) in denying their request

for relief from a jury verdict based upon an allegation of fraud.

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COUNTER-STATEMENT OF JURISDICTION

This Court lacks jurisdiction to issue a writ of certiorari because no federal question is presented. See 28 U.S.C. § 1257(a). On the contrary, the sole issue that Petitioners may properly raise is whether the trial court erred in denying their motion under Vermont Rule of Civil Procedure 60(b)(3) for relief from the judgment. Thus, the Vermont Supreme Court's decision has an adequate and independent basis -- indeed, it has its only basis -- in state law.

COUNTER-STATEMENT OF STATUTES INVOLVED

The only statute, rule, or regulation involved in this matter is Vermont Rule of Civil Procedure 60(b), which reads as follows:

RULE 60. RELIEF FROM JUDGMENT OR ORDER

. . .

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time,

and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review are abolished as means of reopening judgments entered under these rules, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

COUNTER-STATEMENT OF THE CASE

On February 21, 1989, Petitioner Corinne Austin brought to a company known as Mail Boxes, Etc. ("MBE") in Sarasota, Florida, two mink coats for shipment to her son,

Petitioner H. Richard Austin, in Warren, Vermont. MBE gave to Mrs. Austin a document acknowledging receipt of the parcels for shipment and stating that MBE was acting as Mrs. Austin's agent for purposes of shipping the goods. MBE's representative packed both mink coats in the same box.

MBE then contracted with Respondent United Parcel Service ("UPS")[1] for transport of the package containing the two mink coats to Vermont. UPS delivered the package to Mr. Austin's residence in Vermont. When the UPS driver discovered that Mr. Austin was not home to personally accept the package, the driver left the package on Mr. Austin's front porch.

On November 24, 1989, Petitioners commenced an action against UPS in the Washington, Vermont Superior Court, alleging

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1. Pursuant to Rule 29 of the Rules of the Supreme Court of the United States, UPS's parent corporation is United Parcel Service of America, Inc.

that Mr. Austin did not receive one of the two mink coats. UPS defended the action on the grounds, inter alia, that: (1) MBE, not either of the Petitioners, was the "shipper" of the goods, and therefore the Petitioners lacked standing to sue UPS; and (2) Mr. Austin had, in fact, received the allegedly lost coat, as evidenced by the fact that he acknowledged receiving one of the two coats which were both packed in the same box.

After a five-day jury trial, the jury returned a verdict in favor of UPS and against the Petitioners. On the question of standing to sue, Petitioners' theory was that MBE was merely a "freight forwarder," not the "shipper"; Mrs. Austin was the true "shipper" and therefore had standing to sue UPS. At Petitioners' request, the trial court instructed the jury to make a finding as to whether MBE was a "freight forwarder," and Petitioners did not object to the instruction.

The jury found that MBE was not a freight forwarder.

Petitioners also asserted at trial that UPS had breached its duty under the Interstate Commerce Act to properly deliver the package. The trial court rejected UPS's contention that leaving the package on Mr. Austin's front porch constituted "constructive delivery," and the court adopted Petitioners' proposed jury instruction that actual, in-hand delivery to Mr. Austin was required. On these instructions, the jury found that UPS did not fail to properly deliver the package, but that Mr. Austin in fact received the mink coat in dispute. Accordingly, judgment was entered in favor of UPS.

Petitioners filed a motion for a new trial, which the trial court denied, and Petitioners filed a notice of appeal to the Vermont Supreme Court. The Supreme Court then granted Petitioners' motion for remand to the

trial court for consideration of Petitioners' "Motion for New Trial Based on Recently Discovered Fraud." That motion was filed under Vermont Rule of Civil Procedure 60(b)(3), which permits a trial court to grant relief from a judgment based upon "fraud . . . , misrepresentation, or other misconduct of an adverse party."

At the hearing conducted by the trial court on remand, the Petitioners produced a letter from an assistant in the Consumer Affairs Division of the Interstate Commerce Commission ("ICC") in response to a letter written by Petitioners to the ICC on April 6, 1992 -- two months after the verdict was entered. To the extent that it is relevant, the letter states two things: (1) the ICC has previously ruled that entities such as MBE are not, contrary to Petitioners' contentions, freight forwarders; and (2) the ICC has never specifically approved UPS's practice of delivering parcels in some

residential areas without obtaining the addressee's personal signature.[2] The letter does not say that the ICC has ever disapproved that practice (it has not) or that the practice is contrary to UPS's ICC-approved tariff (it is not). This letter from the ICC, which was never authenticated or offered or admitted into evidence -- it is rank hearsay -- is the only "evidence" of "fraud" produced by Petitioners at the hearing.

The trial court denied Petitioners' motion under Rule 60(b)(3) because they had failed to produce "new evidence, newly discovered facts or any new evidence of fraud

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2. Petitioners also complained in the Vermont Supreme Court about UPS's alleged "misuse" of a "parcel register system." A parcel register system is a simplified form of documentation used by many large-volume shippers. That system is irrelevant to the issues here, however, because MBE did not use a parcel register system to ship the package in dispute. Rather, MBE used the standard UPS shipping receipt.

to support or justify a new trial in this cause. No offer of new evidence nor any evidence of fraud was offered prior to the hearing on the Motion nor was any offered at the hearing." (Order of March 29, 1993)

Petitioners then filed another notice of appeal, this one from the trial court's denial of their Rule 60(b)(3) motion. In framing the issues in their brief on the merits in the Vermont Supreme Court, the Petitioners stated that their "appeal is based solely on the second motion regarding Fraud and Newly Discovered Evidence." (Appellant's Brief, May 13, 1993, at p. 9) They asserted no claims of reversible error in the underlying trial on the merits.

On October 22, 1993, the Vermont Supreme Court affirmed the trial court's denial of the motion for relief from judgment under Rule 60(b)(3). The Court noted that the only "evidence" of fraud was the post-trial

letter from an assistant in the Consumer Affairs Division of the ICC. The Court held that "The letter does not show defendant's possible fraud, misrepresentation, or misconduct. Furthermore, there is no reason why the letter could not have been obtained prior to trial." (Order of October 22, 1993) The Court held that Petitioners therefore failed to meet their very substantial evidentiary burden under Vermont Rule of Civil Procedure 60(b)(3). Indeed, the Court concluded that Petitioners'

> claims of fraud and misrepresentation have no support in the record. The [trial] court accepted plaintiffs' view that the law required that the coat be delivered in person to the son, and the jury found such delivery occurred.

(Order of October 22, 1993)

It is this decision under Vermont Rule of Civil Procedure 60(b)(3) that the Petitioners now ask this Court to review.

SUMMARY OF ARGUMENT

The only issue presented to and decided by the Vermont Supreme Court was whether the trial court abused its discretion under Vermont Rule of Civil Procedure 60(b)(3) in denying relief from the jury verdict based upon an allegation of "fraud." The Vermont Supreme Court's decision thus rests upon a state-law basis that is both independent of the underlying federal issues in the case and adequate to support the court's judgment. This Court therefore lacks jurisdiction to issue the requested writ.

In any event, there is nothing for this Court to review. The trial court gave the jury instructions requested by the Petitioners, and Petitioners have not and

cannot challenge the sufficiency of the evidence on which the jury's decision rests.

ARGUMENT

A. This Court Lacks Jurisdiction To Issue A Writ.

The question whether Petitioners satisfied their burden under Vermont Rule of Civil Procedure 60(b)(3) of coming forward with clear and convincing evidence of "fraud" is a pure question of state law. Moreover, the Vermont Supreme Court denied relief under Rule 60(b)(3) both because the letter from the ICC did not demonstrate UPS's possible fraud, misrepresentation, or misconduct, and because Petitioners had unjustifiably failed to obtain the letter prior to trial. Thus, the state-law basis of the Vermont Supreme Court's decision is both independent of the underlying federal issues in the case and adequate to support the Court's judgment. Accordingly, this Court lacks jurisdiction to review the

Vermont Supreme Court's decision. See, e.g., Sochor v. Florida, 112 S. Ct. 2114, 2119-20 (1992); Herb v. Pitcairn, 324 U.S. 117, 126-27 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 13 Wall. 257, 263 (1872).

B. The Trial Court Adopted Petitioners' Proposed Jury Instructions on Issues of Federal Law.

Even if the Vermont Supreme Court had been called upon to decide an issue of federal law, there still would be no sound basis for this Court to issue a writ of certiorari. There is nothing for this Court to review.

On the standing issue, Petitioners did not object to the jury instruction at trial; nor did they assign the jury instruction as a ground for reversal in the Vermont Supreme Court. Even the letter from the ICC, acquired by the Petitioners after the

trial, contradicted the Petitioners' theory that MBE was a "freight forwarder" and that Mrs. Austin, not MBE, was therefore the "shipper."

On the delivery issue, the trial court instructed the jury as the Petitioners had requested. The jury concluded that UPS had not failed to deliver the mink coat, but that Mr. Austin in fact received it. Petitioners never challenged the sufficiency of the evidence on this issue in the Vermont Supreme Court. Nor could they -- the evidence showed that the two coats were packed in a single box, and Mr. Austin acknowledged receiving one of them. Whether the ICC had specifically approved UPS's delivery procedures is irrelevant in light of the jury's determination that this particular delivery was in fact completed to the named consignee.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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